

brake marks which are depicted in the photographs and the plan P7. It is clear from this evidence that the appellant's car travelled for at least 120 feet after he had applied his brakes. Further, the dent in the off front wing of the appellant's car (as shewn on the photograph P6.) indicates that there was a violent impact with the bicycle.

There was a variance in the evidence of the two eye witnesses of these accidents. The witness Lim Kim Kuey stated that the appellant after hitting the boy's father stopped immediately, the other eye-witness Tan Boo Hwa stated that the car proceeded about 25 yards after knocking the man down.

The evidence of the brake marks, however, clearly prove that the version of the latter witness was correct.

For the above reasons the evidence as a whole established that the appellant was driving recklessly (see *Andrews v. Director of Public Prosecutions*,⁽²⁾ and the Magistrate rightly convicted him.

With regard to the sentences imposed, the Magistrate was lenient, but it cannot be said that he was unduly so, and I was not asked by the Deputy Public Prosecutor to enhance these sentences.

The appeal is dismissed. The sentence of 3 months imprisonment imposed on the second charge will date from the hearing of the appeal, viz. the 13th of October. If the fine imposed on the first charge is not paid, the term of imprisonment in default will run from the expiry of the sentence on the second charge.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

RAJA MUSA, Ag. J.

August 18, 1939.

LEE FUNG v. PUBLIC PROSECUTOR.

[NEGRI SEMBILAN MAGISTRATE'S CRIMINAL
APPEAL No. 9 of 1939]

Penal Code, S. 304A—causing death by a rash act—high degree of negligence—necessity of proof of.

The appellant while driving his lorry and after rounding a bend in the road along which he was travelling knocked down and killed a cyclist who was coming from the opposite direction and carrying on his carrier a sack of padi weighing approximately 48 catties. The appellant was convicted by the Magistrate at Kuala Pilah under section 304A of the Penal Code. It was proved (1) that the appellant rounded the bend on his right edge and therefore the wrong side of the road (2) that before he

rounded the bend his view beyond the bend was obstructed by a hillock in front and he did not see what was happening beyond it (3) that on coming to the apex of the bend he suddenly saw the deceased on his bicycle about 10 feet in front of the lorry and (4) that he swerved a little to his left and at the same time applied his brakes but as the deceased was very close to the lorry he could not avoid hitting the deceased.

Held, on the facts as outlined above, that the appellant was guilty of that high degree of negligence necessary to support a charge under Section 304A of the Penal Code and that the conviction must be affirmed.

Case referred to:—

(1) *Cheow Keok v. Public Prosecutor*, 9 M.L.J. 103.

MAGISTRATE'S CRIMINAL APPEAL.

Jeff for the Appellant.

Majoribanks, Deputy Public Prosecutor, for Public Prosecutor.

Raja Musa, Ag. J.—The facts in this case are briefly these:—

The appellant while driving his lorry N.S. 4707 and after rounding a bend in the road knocked down and killed the deceased who was coming from the opposite direction on a bicycle and who was carrying on his carrier a sack of padi weighing approximately 48 catties.

The appellant was convicted by the learned Magistrate at Kuala Pilah on the 4th April, 1939, under section 304A of the Penal Code and under Rule 56 of the Motor Vehicles (Construction and Use) Rules 1937. He was sentenced to 3 months' rigorous imprisonment on the charge under section 304A and to a fine of \$15/- or 1 week's rigorous imprisonment on the charge under the rule.

Against those convictions and sentences he now appeals.

The hearing of the appeal was delayed pending the result of Selangor Criminal Appeal to the Court of Appeal No. 1 of 1939—*The Public Prosecutor vs. Cheow Keok*⁽¹⁾ which raised the question as to the degree of negligence required for a conviction under section 304A of the Penal Code.

The decision of the Court of Appeal has now been pronounced and I am bound by its ruling to the effect that a very high degree of negligence must be proved before an accused person can properly be convicted under the section.

This ruling merely contains a general proposition of law and each case must still be decided on its own particular facts.

The learned Magistrate said in his grounds of judgment:—

“From the above I am of opinion that what actually happened was that the accused rounded the bend on his extreme right edge of the road at an excessive speed. Before he rounded the bend his view beyond the bend was obstructed by the hillock and he did not see what was happening beyond it. On coming to the centre of the bend he suddenly saw the deceased on bicycle about 10 feet in front of the lorry. He swerved a little to his left and at the same time applied his brake but as the deceased was very close to the lorry then he could not avoid it from hitting the deceased.”

That, I think summarises the main and sole question in this case. Is the learned Magistrate right in forming that opinion? Although expressed in the form of an opinion I regard that opinion as an expression of his findings of fact.

I disregard the term “excessive speed” used by the learned Magistrate because it is a term so elastic in its meaning that it is difficult to define.

The findings of fact expressed in that opinion, with the modification as to excessive speed, are these:—

(1) The appellant rounded the bend on his extreme right edge of the road.

(2) Before he rounded the bend his view beyond the bend was obstructed by the hillock and he did not see what was happening beyond it.

(3) On coming to the centre of the bend he suddenly saw the deceased on his bicycle about 10 feet in front of the lorry, and

(4) He swerved a little to his left and at the same time applied his brakes but as the deceased was very close to the lorry he could not avoid hitting the deceased.

I will say at once that if these findings are correct I have no hesitation in saying that there is a very clear case of negligence or rashness within the meaning of section 304A in this case.

The appellant's lorry is a large “Chevrolet” lorry. Its width in front is given as 5 feet 11 inches and its body 6 feet 9 inches wide. It was loaded with timber and tiles. The road at this point is 14 feet wide.

To drive a lorry of the size of the appellant's on this road on its extreme right hand side when taking a right hand curve and when the view is not clear is, to my mind, the height of recklessness. Conduct such as that, in my opinion, is tantamount to conduct whereby an accused person says: “I don't know what is coming in front of me but I will take chance.” When that chance does not come off and some one is killed I have no hesitation in saying that that is conduct showing such a disregard for the life and safety of others as to amount to an offence under section 304A of the Penal Code.

Now are those findings of the learned Magistrate correct?

The first finding is that the appellant rounded the bend on his extreme right hand side of the road.

The evidence in the case does not go so far as to show that the appellant went as far as his *extreme* right. He admits to “taking the bend a little to the right side of his road.” The eye witnesses to the accident all speak of the appellant driving on the right hand side of the road at the moment of impact but no attention appears to have been paid in the course of the trial in the Court below as to the manner in which the appellant negotiated this bend.

There is therefore a doubt as to whether or not the appellant rounded the corner on his extreme right and the benefit of that doubt must go to him. That being so all that can then be said of the appellant's conduct is that he rounded that corner on his right and therefore the wrong side of the road. Judging from the direction of the tyre marks seen on the photographs and from measurements given by the Inspector Yunus, I think it can also be said that the appellant took that bend well on his wrong side of the road.

The main point in the second finding is that in taking that bend as he did the appellant placed himself in such a position that he could not and did not see what was coming from in front of him beyond the bend.

The Inspector, Yunus bin Talib, said:—

“This is not a blind corner. If the corner is properly negotiated on the left side one could see what is coming from the opposite direction.”

The inference that can be drawn from this last statement is that if that bend was negotiated on the wrong side one could not see what was coming from the opposite direction.

Mr. Jeff for the appellant argued that this bend was not a real corner but that it was merely a bend in the road with visibility of 30 or 40 yards ahead. Mr. Jeff of course cannot give any evidence but accepting as I do his statement it does not help me one way or the other because he cannot say in the sense that he is precluded from saying from what point that visibility of 30 or 40 yards in front is.

I think, however, the matter is, if I may use the expression, clinched by the evidence of the appellant himself. In his examination-in-chief he said:—

“As I came round the bend I was going about 25 miles per hour. There was no other traffic on the road. I came out of the corner in a normal way. After that I saw a cyclist approaching me. I moved towards my left.”

The vital words in this evidence are "I came out of the corner in a normal way. *After that* I saw a cyclist approaching me."

His "normal way" was, as already found, to take the bend well on his wrong side of the road and it was *after he had come out* in that manner that he noticed the cyclist.

The appellant repeated this evidence in cross-examination. He said:—

"I was taking the bend a little to right side of my road. I took the right side because there was no traffic from the opposite direction. By taking the course as I was doing I could see what was coming from the opposite direction. After the bend only I saw the cyclist coming. I was on the straight road when I saw the cyclist coming."

This evidence to my mind lends support to the converse of or rather the inference to be drawn from the evidence of Yunus, the Inspector, that if that bend in the road was negotiated on the wrong side one could not see what was coming from the opposite direction. The deceased cyclist was undoubtedly there on the road but on the appellant's own admission it was not until he had come out of the bend and on to the straight road that he saw the deceased. It follows therefore that when he decided to negotiate the corner in the manner he did not see and could not have seen a clear view of the road.

For these reasons I think the learned Magistrate was correct in his finding of this fact.

The third and fourth issues that the learned Magistrate found may be dealt with together.

The third is that on coming to what has been described as the centre of the bend (it is I imagine more correctly called the apex) the appellant suddenly saw the deceased on his bicycle about 10 feet in front of the lorry.

The fourth and last issue is that upon seeing the deceased the appellant "swerved" a little to his left and at the same time applied his brakes but as the deceased was very close to the lorry the appellant could not avoid hitting him.

The "centre" of the bend is the point P. in the sketch and beyond it is the point A. which is the point of commencement of the back right tyre mark of the appellant's lorry. According to Inspector Yunus the

distance between points P. and A. is ten feet. This finding of the learned Magistrate then amounts to this. When the appellant arrived at the point P. the deceased was at the point A. One has to bear in mind that they were then still proceeding towards each other and the impact then took place somewhere between points A. and P.

Mr. Jeff suggested that the point of impact was obviously between the Point A. and the point K. which is the point of commencement of a streak of blood on the road.

The appellant said in examination-in-chief:—

"After that I saw a cyclist approaching me. I moved towards my left. The cyclist had a big bag on the back of his cycle. He was not steady. He was wobbling. I slowed down by using my brake. I used my foot brake. I gave the cyclist more space."

In cross-examination he said:—

"I was on the straight road when I saw the cyclist coming. When I first saw him he was on his left side of the road. He was about 30 to 40 feet when I first saw him. I was more or less in the centre of the road near the far kerosine oil tin in Exhibit 'A1' then. There were brake marks there but the marks were little. From Exhibit 'A1' the brake marks at that point are seen very severe. I applied the brakes moderately. I did not collide with the cyclist before the brake marks. From the first time I saw him he was not steady but he was going on his left side of the road. He was wobbling. When I saw this I went to my left to give him more space."

Inspector Yunus said:—

"The witnesses pointed out that the collision took place between points P. and A. i.e. after the centre of the corner and before the start of the brake marks."

The learned Magistrate said:—

"The explanation he gives for the lorry to have made 60 feet long of brake marks is most unconvincing. According to him he first saw the deceased about 30 to 40 feet in front of him and if this was true there was no necessity for him to apply his brake when he first saw the deceased because the latter was, according to him, on his (deceased) left side of the road then."

In effect the learned Magistrate rejected any suggestion that the point of impact was any where else than between points P. and A.

I am not prepared to say that the learned Magistrate had no evidence to support this finding.

As to the fourth and last finding the only comment I need make is as to the use of the word "swerved". "Edged away" would, I think, express the meaning better. The evidence in the case as a whole amply supports the finding that the appellant edged away to his left but none the less he was unable to avoid the deceased completely.

In the result I hold that the learned Magistrate was correct in his finding of the facts I have set out above except with the modifications I have tried to indicate. That being so I consider that the conviction is correct.

It was suggested that the deceased himself was guilty of negligence in carrying on the back of his bicycle a heavy load of padi.

I am aware that contributory negligence is not a defence to a charge of criminal negligence but that evidence of it is relevant in order to show whether or not it was the accused person's negligence that caused the death. In any event, however, whether it was or was not negligent of the deceased to carry that sack of rice on that particular day I am satisfied that

the negligence of the appellant was the *causa causans* of this fatality.

As to the second conviction the evidence shows that the hand brake of the appellant's lorry at a speed of 22 miles per hour only stopped the lorry after 90 yards.

Mr. Jeff complained that there was no standard to indicate when a brake is considered efficient and when not. It is conceded that there is no such standard yet.

The learned Magistrate however said:—

"The test on the brakes of the lorry disclosed that the vehicle stopped at a distance of 90 yards from the place where the hand brake was first applied when it was travelling at a speed of 25 miles per hour and from this result common sense would tell that the brake was inefficient."

Twenty-five miles per hour should read 22 miles per hour because the evidence of Inspector Yunus is to that effect. I agree with the learned Magistrate.

For these reasons I dismiss the appeal and affirm the convictions and sentences.

Appeal dismissed.

